IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 154 OF 1988

Nagnath Namdeo Morkane. .... Appellant.

Versus.

1. Ramchandra Tatyaba Atkare.
2. Parmeshwar Tatyaba Atkare. .... Respondents.

AND

SECOND APPEAL NO. 155 OF 1988

Nagnath Namdeo Morkane. ... Appellant.

Versus.

1. Ramchandra Tatyaba Atkare.
2. Parmeshwar Tatyaba Atkare. ... Respondents

Ms.A.R.S.Baxi for the Appellant in both the appeals.

Shri Jagdish G.Reddy holding for Shri P.K.
Dhakephalkar for the Respondents in both the appeals..

CORAM : ABHAY S. OKA, J.

DATED : 13th August, 2004.

ORAL JUDGMENT.

1. Both the Second Appeals can be conveniently disposed

of by a common Judgment.

2. Second Appeal No.154 of 1988 was admitted by this Court on 22nd April 1988 by observing that Grounds Nos.1 and 2 are substantial questions of law. Grounds Nos.1

and 2 read thus:

(1) The Court below has failed to consider that the Respondents have first filed the suit for specific performance and also claimed possession. It is submitted that this clearly showed that the Respondents were not put in possession. Further, there was no averment made in the plaint at all that possession was given either at the time of agreement or at the time of execution of the alleged Kabje-Pavati.

(2) The Court below has failed to consider that the trial Court granted ad-interim injunction against the Respondents, which came to be confirmed and also the suit decree and that the Respondents filed appeal, no attempt was made to get the same vacated. it is submitted that this clearly proved that the Appellant was in possession of the suit land continuously.

In so far as the Second Appeal No.155 of 1988 is concerned the same was also admitted on 22nd April 1988 on the same substantial questions of law.

3. The Appeals arose out of cross suits filed by the parties. The Appellant is the original Plaintiff in Regular Civil Suit No.34 of 1979 filed against the Respondents. The Respondents are the Plaintiffs in the cross suit being Regular Civil Suit No.68 of 1978.

4. Regular Civil Suit No.68 of 1978 was filed by the Respondents for specific performance of agreement for sale dated 10th June 1975 executed by the Appellant and other co-sharers in their favour. As per the said agreement, the price of the suit land described in paragraph 1 of the plaint was fixed at Rs.14,000/-. According to the Respondents a sum of Rs.6,000/- was paid as earnest money to the vendors. The co-sharers of the Appellant executed a sale deed in favour of the Respondents on 19th January 1978 in respect of their 1/2 share by taking a sum of Rs.7,000/- from the Respondents. The case made out in the plaint is that the Respondents were ready and willing to pay the balance consideration of Rs.8,000/-. The case made out by the Respondents is that the Appellant failed to obtain permission of the Revenue authorities for execution of the sale deed. After issuing notice dated 3rd June 1978 the suit for specific performance came to be filed by the Respondents.

5. The suit was resisted by the Appellant by filing his Written Statement. He denied existence of sale transaction and stated that there was a money lending transaction between the parties. A contention is raised that the market value of the suit property was Rs.25,000/-. The Appellant prayed for dismissal of the suit.

6. In so far as Regular Civil Suit No.34 of 1979 is concerned, the same is filed by the Appellant against the Respondents for perpetual injunction in respect of the suit property. The Respondents contested the said suit by contending that they were put in possession of the suit property on the date of execution of the agreement dated 10th June 1975 and therefore, the suit for perpetual injunction filed by the Appellant was not maintainable. The trial Court partly decreed Reg.Civil Suit No.68 of 1978. The trial Court dismissed the prayer for specific performance and passed a decree for refund of Rs.3000/-. In so far as Suit No.34 of 1979 is concerned, the same was decreed and the Respondents were restrained from interfering with the possession of the Appellant over the land bearing Gat No.134 to the extent of two acres and 47 ares from the southern side.

7. The Respondents preferred separate appeals in the

District Court for challenging the Judgments and Decrees passed by the trial Court. Both the Appeals were allowed by common Judgment dated 30th January 1986. The Appellate Court decreed Regular Civil Suit No.68 of 1978 and passed a decree for specific performance against the Appellant. The Appellate Court dismissed Regular Civil Suit No.34 of 1979 filed by the Appellant. The Appellant has taken exception to the Judgment and Decree passed by the Appellate Court by preferring the Second Appeals.

8. The learned Counsel appearing for the Appellant in both the Appeals submitted that there is no material on record to show that the Respondents were put in possession of the suit land subject matter of the suit agreement at the time of execution of the suit agreement or at the time of execution of **kabje pavati.** The learned Counsel further submitted that in the suit for injunction filed by the Appellant, the Appellate Court had granted ad-interim injunction for protecting the possession of the Appellant and ultimately the suit came to be decreed and the decree for perpetual injunction was passed which was operating during the pendency of the Appeal. She pointed out that the trial Court exercised discretion under section 20 of the Specific Relief Act, 1963 by refusing to grant decree for

specific performance. She further submitted that the trial Court has given reasons in paragraph 19 of the Judgment for exercising discretion against the Respondents. The trial Court has recorded that the summons was issued to the office of the Deputy Collector to produce the documents regarding the sale permission and after the summons was served a letter was filed at Exh.36 by the Deputy Collector that no application for permission was ever made. The trial Court found that in the circumstances, the Respondents were not ready and willing to perform their part of the agreement. The trial Court also considered that the suit property was the only property available to the Appellant and therefore, the discretion should be exercised against the Respondents. The learned Counsel submitted that once discretion was exercised by the trial Court under section 20 of the said Act of 1963, the Appellate Court could not have interfered with the exercise of the said discretion unless it was shown that the exercise of discretion was perverse or arbitrary. The learned Counsel invited my attention to the oral evidence on record.

9. The learned Counsel appearing for the Respondents at the outset stated that the decree for specific performance has been executed and a registered sale deed

has been executed on 3rd August 1988 in favour of the Respondents by the Court Commissioner appointed in execution proceedings and subsequently the names of the Respondents are mutated in the Revenue Records. He submitted that the trial Court also recorded a finding that the suit agreement for sale was proved and the Respondents also established that a sum of Rs.3,000/- was paid to the Appellant by way of earnest money. He submitted that the application for sale permission ought to have been made by the Appellant being the vendor and even assuming that no such application was made by the Respondents on this ground alone it cannot be held that the Respondents were not ready and willing to perform their part of the agreement. He pointed out the findings recorded by the Appellate Court and submitted that the findings are in the nature of findings of fact and cannot be interfered with under section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") He pointed out that in so far as the execution of the suit agreement and payment of earnest money is concerned there were concurrent findings of fact recorded by both the Courts below. He pointed out that in so far as delivery of possession is concerned, the trial Court did not frame any specific issue in the suit for specific performance. He submitted that without prejudice to their rights and contentions the

Respondents are ready and willing to pay a sum of Rs.20,000/- to the Appellant as lumpsum compensation in addition to the agreed price reflected from the suit agreement. He stated that the Respondents will pay a sum of Rs.10,000/- to the Appellant within a period of four weeks from today and balance amount of Rs.10,000/- will be paid within a further period of four weeks.

10. I have considered the rival submissions. In the suit for specific performance filed by the Respondents, the Appellant has denied existence of sale transaction and it was contended that the real transaction was a loan transaction. In so far as the execution of the agreement for sale is concerned, the Courts below have recorded concurrent findings of fact in favour of the Respondents. The trial Court has considered the evidence on record. The trial Court also referred to the evidence of Tatyaba who was examined by the Appellant to show that the so called suit agreement was the outcome of a money lending transaction. The said Tatyaba has executed a sale deed in favour of the Respondent. The trial Court disbelieved Tatyaba's version as he had no subsisting interest in the suit property as he had already executed a sale deed in so far as his share is concerned. The trial Court found that the said witness admitted the execution of the sale

deed executed by him. The trial Court also considered the fact that receipt of part payment of the consideration has been admitted by the Appellant.

11. The Appellate Court also considered evidence on record. The learned Counsel for the Appellant criticized the finding recorded by the Appellate Court to the effect that as the Respondents had paid half price at the time of the agreement in all probability the Respondents must have obtained possession of the suit land on the date of the agreement and that the Appellant has not produced any evidence to show that the possession of the suit land was not delivered to the Respondents. There is some substance in the criticism of the said findings recorded by the Appellate Court. The Appellate Court could not have put the negative burden on the Appellant to prove that he had not delivered possession of the suit land. However, the Appellate Court has also examined evidence on record. The Appellate Court has referred to the recitals in the Agreement which show that the Respondents were put in possession. The Appellate Court also considered the evidence of the attesting witness who deposed that the Respondents were put in possession. Only after considering the evidence, the Appellate Court has recorded a finding of fact in favour of the Respondents.

There is no perversity in the said finding. Hence the said finding needs no interference.

12. The only ground given by the learned trial Judge for holding that the Respondents were not ready and willing to perform their part of the agreement was that the Respondents did not apply for sale permission. The Appellant was the vendor under the agreement and if the Respondents had failed to apply for the permission, the Appellant was also equally responsible to apply for sale permission. Therefore, the trial Court could not have drawn an inference that the Respondents were not ready and willing to perform their part of the agreement only on the ground that the Respondents have not applied for sale permission. As stated earlier, there are concurrent findings recorded in so far as the execution of the agreement for sale and payment of earnest money is concerned. There is neither any perversity nor illegality in the said concurrent findings of fact. In the absence of any material on record, it is not possible to accede to the submission of the learned Counsel for the Appellant that the Respondents are not ready and willing to perform their part of the contract. Therefore, there is no substance in the challenge to the decree for specific performance. As stated earlier, the Respondents made a categorical statement that they will

pay a sum of Rs.20,000/- to the Appellant by way of compensation. The said statement is accepted and accordingly direction will have to be given to the Respondents to pay the said amount to the Appellant.

13. In so far as the other Second Appeal is concerned, as stated by the learned Counsel for the Respondents the decree for specific performance has been already executed and therefore the Appellant obviously cannot claim to be in possession of the suit property. Therefore, there is no question of granting any perpetual injunction in favour of the Appellant.

13. Hence the following order is passed:

(i) Second Appeal No.155 of 1988 is dismissed.

(ii) Second Appeal No.154 of 1988 is dismissed. Decree for specific performance granted by the Appellate Court is confirmed. As per the statement made by the learned Adocate for the Respondents, the Respondents are directed to pay a sum of Rs.20,000/- to the Appellant within a period of 8 weeks from today. A sum of Rs.10,000/- shall be paid within a period of four weeks from today and the balance sum

of Rs.10,000/- shall be paid within the subsequent period of four weeks.

(iii) There will be no order as to costs.

**Judge.**